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Nos. 87-1622, 87-1697, and 87-1711

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHILIP BRENDALE,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION, *et al.*,
Respondents.

STANLEY WILKINSON,
Petitioner,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

COUNTY OF YAKIMA, *et al.*,
Petitioners,

v.

CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIAN NATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR MENDOCINO COUNTY, CALIFORNIA; BECKER COUNTY AND MAHNOMEN COUNTY, MINNESOTA; LAKE COUNTY, ROOSEVELT COUNTY AND SANDERS COUNTY, MONTANA; THURSTON COUNTY, NEBRASKA; MOUNTRAIL COUNTY, MCLEAN COUNTY AND WARD COUNTY, NORTH DAKOTA; TODD COUNTY AND ZIEBACH COUNTY, SOUTH DAKOTA; DUCHESNE COUNTY AND UINTAH COUNTY, UTAH; FREMONT COUNTY, WYOMING; AND WASHINGTON STATE ASSOCIATION OF COUNTIES, WASHINGTON, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

(Counsel Listed on Inside Cover)

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INTEREST OF AMICI CURIAE

On August 9, 1988, at the annual meeting of the National Association of Counties, a Resolution was passed in recognition of the importance of this case as it relates directly to county governments. That Resolution provides in pertinent part:

> WHEREAS, in 1985 the Public Lands Steering committee adopted a resolution in recognition of the complicated relationships between tribal and county governments caused by the unique legal status of Native Americans under federal law, treaties and court decisions; and
>
> WHEREAS, this same resolution also recognized the need for individual counties to join together to address issues of mutual concern in order to conserve scarce resources and increase their effectiveness; and
>
> WHEREAS, the United States Supreme Court recently agreed to decide the case of the Yakima Indian Nation, which case involves tribal jurisdiction over non-members; and
>
> WHEREAS, the Attorneys General of Arizona, Nevada, New Mexico, South Dakota, Utah, Washington, and Wyoming have stated that the precedent in this case, if not reversed, will result in even more claims of preemption by tribal governments of state and local governmental powers over non members, not just in the area of zoning, but in broader uses such as environmental controls, taxation, and general business regulation, and . . .
>
> WHEREAS, individual units of local government cannot effectively be heard in an effective manner due to an insufficiency of local resources; now, therefore
>
> BE IT RESOLVED, that the Public Lands Steering Committee request individual units of local government collectively support and fund a joint effort in the support, briefing, argument and related aspects of this case before the United States Supreme Court, and

BE IT RESOLVED, that the Public Lands Steering Committee commends those Attorneys General that have filed in support of the petitioner and further urges those Attorneys General to devote additional staff, time, and resources in support of Yakima County.

The concern that prompted the Resolution can be simply stated. Tribal governments across the United States have enacted hundreds of ordinances claiming varying degrees of civil jurisdiction over non-Indians on fee lands. Almost without exception, these tribal ordinances are premised on some aspect of the political integrity, economic security or the health or general welfare of tribal government. In effect, tribal advocates have pushed a misreading of this Court's *Montana* decision beyond belief. To date, these tribal actions promise the most extensive litigation ever experienced by these units of local government—at a time when county governments can ill afford to squander scarce resources on senseless litigation. There is no question that the primary impact of shifts in federal Indian policy, from whatever source, falls squarely on units of local government, and this problem is pronounced.

The counties joining in this Brief all contain areas that were at one time established as Indian reservations. They are representative of many other counties similarly situated throughout the United States. The history of each area is, of course, as varied and diverse as federal Indian policy—with one exception. Historically, no tribal court here has ever been recognized by anyone to have tribal civil jurisdiction over non-Indians or fee lands. Historically, such a procedure would have uniformly been viewed as novel and unusual, and certainly inconsistent with prior practice and experience.

To be sure, the extent of the experience of each *amici* with Indian reservations reflects radically differing fact situations. For example, it was not until 1985, that the Tenth Circuit Court of Appeals resurrected the boun-

daries of the original Uncompahgre Reservation and the original Uintah Reservation so as to encompass most of Duchesne County and Uintah County, Utah. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 107 U.S. 596 (Dec. 1, 1986). Before that time, the lands constituting the Ute Tribe's Reservation were considered to be only those lands held in trust by the federal government (more than 1,000,000 acres). Now the second largest Indian reservation in the United States, the entire region is 90% non-Indian and 3,000,000 acres of the territory are non-Indian owned. Although the United States agrees that the Uncompahgre Reservation ceased to exist a century ago, the disestablishment issue is still in litigation in state court. The Tribal Law and Order Code contains more than 600 sections in 162 pages of closely printed type and asserts detailed authority over all persons living or traveling within the boundaries of its Reservation, wherever those boundaries may be. The Ute Tribe has the power, according to its Code, to exclude and remove "persons" from the Reservation who threaten "the peace, health, safety, morals and general welfare of the Tribe," if necessary even without a hearing before the Tribal Court (§§ 3-1-3, 3-1-4).

In 1982, Fremont County, Wyoming, was informed that the power to control use of non-Indian owned land within the Wind River Reservation simply "flows from the inherent sovereign right" of Indian tribes. *Knight v. Shoshone and Arapaho Indian Tribes*, 670 F.2d 900, 903 (1982). On a record that was clearly deficient, this pronouncement was received with uniform disbelief. *Id.* Over two-thirds of the population in Fremont County within the original reservation is non-Indian and 83% of the land is non-Indian owned.

Ziebach County, South Dakota, entirely within the Cheyenne River Indian Reservation as a result of this Court's opinion in *Solem v. Bartlett*, 465 U.S. 463 (1984), has since found out that even tribal constitu-

tions do not necessarily set the limits of this new tribal civil jurisdiction over non-Indians. The Cheyenne River Sioux Tribe recently instituted several measures that assert tribal civil jurisdiction over non-Indians on fee lands, in spite of an express prohibition in their tribal constitution.

In Mendocino County, California, the resurrection of a rancheria with "Indian Country" status has been judicially recognized, primarily as a result of a recent stipulation by an Assistant United States Attorney. The governing board of the rancheria immediately imposed a zoning moratorium on the non-member residents of the area on fee lands, in the first of what promises to become a more typical situation for counties in the State of California.

Other *amici* share the distinction of having faced sporadic litigation for years. The original 1867 White Earth Reservation encompassed parts of Becker County and Mahnomen County, where a substantial majority of residents are non-Indians and 90% of the land is non-Indian owned. In the last two decades these counties have been defendants in numerous lawsuits including tribal claims of exclusive hunting and fishing jurisdiction, land claims, boundary claims, and related issues. The attempts of the counties to serve their residents and resolve even such mundane matters as rural garbage disposal routinely meet with tribal resistance.

And the list goes on. Lake County and Sanders County, Montana, and the Flathead Reservation; Roosevelt County, Montana, and the Fort Peck Reservation; Thurston County, Nebraska, and the Omaha and Winnebago Reservations; Mountrail County, McLean County and Ward County, North Dakota, and the Fort Berthold Reservation; and Todd County, South Dakota, and the Rosebud Reservation—litigation on reservation boundaries, litigation on land claims, and the list goes on. Cooperative agreements have resolved some of the legitimate

questions and in the future, similar agreements can also hopefully serve this purpose. But the addition of tribal zoning and tribal taxation and so forth, to this list, serves no legitimate purpose.

Significantly, in most of these Indian reservations, and others, non-Indian population and non-Indian fee ownership figures at least meet or exceed those of the Indian tribe. County government in these same areas is not some new and novel experience. It has been there for decades pursuant to congressional policy. That policy never contemplated Indian tribes with civil jurisdiction over non-Indians on fee lands. This Court in this case should restate *Montana* and set that policy forth in no uncertain terms. *Amici* recognize the need for cooperative effort to facilitate legitimate federal policy on Indian reservations, but no one needs to have this new litigation dominate the agenda of local government for the last decade of the twentieth century.

SUMMARY OF ARGUMENT

The Court of Appeals was quick to criticize this Court four times in the opinion below. According to the Court of Appeals, the recent "tests" formulated by this Court to resolve the issue here (tribal civil jurisdiction over non-Indians on fee lands) are "without apparent consistency", "disregarded" by the Court itself, and rife with "conflicting language". *Yakima Indian Nation v. Whiteside*, 828 F.2d 529 at 533, 534 n.1 (9th Cir. 1987). *Amici* do not agree. The controlling law in this case is clear.

In *Oliphant* and *Montana* this Court reiterates basic principles. And had the Court of Appeals paid more than mere lip service to the substance of those opinions, these cases would not be here.

Amici recognize that *Oliphant* and *Montana* do not automatically preclude Indian tribes from exercising civil jurisdiction over non-members on fee land in every imag-

inable situation. Detailed study of relevant statutes, Executive Branch policies, treaties, administrative and judicial decisions, as well as the sovereign aspects of the issue, are undeniably an appropriate endeavor for all courts presented with the question. *National Farmers Union Insurance Cos. v. Crow Tribe of Indians et al.*, 471 U.S. 845, 855-56 (1985). But once revisited, the carefully delineated principles set forth in *Oliphant* and *Montana*, we submit, authoritatively resolve the issue. Simply stated, *Oliphant* and *Montana* attest that absent affirmative delegation by Congress, Indian tribes do not have civil jurisdiction over non-members on fee lands. Such a power is inconsistent with their dependent status, and can not survive without express congressional delegation. Because the Yakima Nation cannot demonstrate this affirmative or express congressional delegation, the analysis of the Court of Appeals is as fundamentally flawed here as it was in the Court of Appeals' decisions in *Oliphant* and *Montana*.

Nor is there a need for this Court to depart from the contours of the doctrine this Court set forth in *Oliphant* and *Montana*. In this instance, as in other areas of federal Indian law, a coherent doctrine by which to measure, with some predictability, the scope of tribal jurisdiction over non-Indians is sorely needed. *Oliphant* and *Montana* have established that doctrine. All that remains to be done is to underscore and restate this well defined body of principles. Principles are essential here, to end the case by case tribal civil jurisdiction litigation which otherwise promises to plague this area of the law for years.

To be sure, the most sophisticated arguments will be submitted to advance the tribal cause. In *Oliphant*, the *Brief for the United States* stands as a work of art. And one can also expect a plethora of policy considerations in support of the tribal position. But the conclusion

of this Court in *Oliphant* and *Montana*,[1] based on established precedent and principles, should lead this Court to the same result here—and the policy considerations are still for Congress to weigh.

ARGUMENT

> [Mr. Justice Rehnquist] "QUESTION: Mr. Ernstoff, is there any way of distinguishing your case from a civil jurisdiction of the Tribe so that the Court could, in a principled way, say there was criminal jurisdiction here but not civil jurisdiction?
>
> MR. ERNSTOFF: That is a very interesting question, Your Honor. I really do not know that they can, to be honest with you, I have been trying to do that because I thought it would be of benefit to me to come in with the most narrow case that I can possibly come in with.
>
> To be intellectually honest, I do not think you really can and I do not think that you should."

Tr. of Oral Argument, at 53-54, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

I. THIS COURT HAS ESTABLISHED CLEAR PRINCIPLES FOR DECIDING QUESTIONS OF TRIBAL CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS.

A. In *Oliphant* This Court Set Forth Precedent And Presumptions That Are Controlling Here.

1. *Precedent.*

The central principle in *Oliphant* was succinctly stated; "An examination of our earlier *precedents* satisfies us that, even ignoring treaty provisions and congressional policy, Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power

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[1] "I agree with the Court's resolution of the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by non-members of the Tribe." *Montana*, 450 U.S. at 581 n.18 (Blackmun, J. dissenting in part; Brennan and Marshall, JJ., joining).

by Congress." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978) (emphasis added). In terms of civil jurisdiction these *precedents* are equally persuasive here, and the absense of affirmative delegation by Congress is therefore similarly controlling. *Oliphant* repeatedly stressed that the Suquamish Tribe did not contend that its jurisdiction stemmed from affirmative congressional authority or treaty provisions. *Id.* at 195-96, 198. The claim of the Yakimas suffers from the same fundamental defect. *Yakima*, 828 F.2d at 533. In both instances the Court of Appeals accepted the tribe's position. In *Oliphant*, tribal criminal jurisdiction over non-Indians, according to the Court of Appeals, was simply a *sine qua non* of tribal sovereignty. 544 F.2d at 1009, 425 U.S. at 196. Here, the Court of Appeals reasoned that tribal civil jurisdiction was a *sine qua non* of tribal sovereignty as it relates to the health, safety, and welfare of the Yakima Tribe. *Yakima*, 828 F.2d at 534. The presumption of the Court of Appeals is the same in both instances, and it is as fundamentally flawed here as it was in *Oliphant*.

A recognition of a retained sovereignty that would permit civil jurisdiction over non-Indian citizens on fee lands is inconsistent with the dependent tribal status and ignores a uniform tribal "forfeiture of full sovereignty in return for the protection of the United States". *Oliphant*, 435 U.S. at 211. The precedents and analysis in *Oliphant* are not limited to criminal jurisdiction, but are equally applicable here. In isolation, the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers 524 (1855) is as silent on tribal civil jurisdiction over non-Indians, as the Treaty of Point Elliot construed in *Oliphant* was on criminal jurisdiction. 435 U.S. at 206.

The addition of historical perspective casts even further, substantial doubt on the existence of such jurisdiction. 435 U.S. at 206. In Article VIII, for example, the Yakimas also acknowledge their "dependence on the government of the United States". Yakima Treaty, 12 Stat. 951, 2 Kapplers 524 (1855), *see Oliphant*, 435 U.S. at

207 for a similar acknowledgement. And as in Mr. Chief Justice Marshall's explanation cited in *Oliphant*, such an acknowledgement is not a mere abstract recognition of the United States' sovereignty, but rather is a necessary acknowledgement of dependence on the United States. It is as significant in terms of the lack of tribal civil jurisdiction over non-Indians as it is in terms of the lack of tribal criminal jurisdiction. *Id.* at 206-07.

Equally applicable are the pronouncements in *United States v. Rogers*, 4 How. 567, 571 (1846), quoted in *Oliphant*, that Indian reservations are "a part of the territory of the United States"; that Indian tribes "hold and occupy [the reservations] with the assent of the United States, and under their authority". *Rogers*, 4 How. at 572; *Oliphant*, 435 U.S. at 208-209. As *Oliphant* noted, "Upon incorporation into the territory of the United States, the Indian tribes thereby, come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Id.* at 209. Applicable, also, is *Johnson v. McIntosh*, 8 Wheat. 543 (1823), which states "[t]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished." 8 Wheat. at 574. *Oliphant*, 435 U.S. at 209. Limitations inherent in such a situation, as expressly set forth in *Fletcher v. Peck*, 6 Cranch 87 (1810), are similarly inclusive.

> [T]he restrictions upon the right of soil in the Indians, amount . . . to an exclusion of all competitors to the United States from their markets; and the limitation upon their sovereignty amounts *to the right of governing every person within their limits except themselves.*"

Fletcher v. Peck, 6 Cranch at 147; *Oliphant*, 435 U.S. at 209 (emphasis as in original).

And certainly the manifestations of the United States from the formation of the Union and the adoption of the Bill of Rights, that its citizens be protected by the United

States from unwarranted intrusions on their personal liberty, noted in *Oliphant*, are of no less importance, when viewed in the context of tribal civil jurisdiction. *Id.* at 210. In sum, these are the "precedents" this Court relied on in *Oliphant*. And, in this context, tribal civil jurisdiction is indistinguishable from tribal criminal jurisdiction in all significant respects.

2. *Presumptions.*

Admittedly, "considerable weight" was also given in *Oliphant* to the "commonly shared presumption" of Congress, the Executive Branch, and lower federal courts that "tribal courts did not have the power to try non-Indians." *Id.* at 206. But in most instances, the documentation cited in support of this presumption, undermines the existence of tribal civil jurisdiction over non-Indians as well.

The effort by tribal courts to exercise civil rather than criminal jurisdiction over non-Indians, is also a relatively new phenomenon. *Id.* at 197. Until recently, formal tribal court systems did not really exist for civil or criminal purposes. *Id.* at 197. The history of Indian treaties in the United States that is consistent with the principle that Indian tribes may not assume criminal jurisdiction over non-Indians without the permission of Congress, is equally persuasive on the question of civil jurisdiction. *Id.* at 197-98 n. 8.

It is true that historically there has been more occasion to address the question of federal criminal jurisdiction over non-Indians, but nothing in the response even arguably adds anything to the tribe's claim for civil jurisdiction. To the contrary, in one of the two Opinions of the United States Attorney General correctly cited for the lack of criminal jurisdiction, tribal civil jurisdiction is actually the issue, and it was specifically limited to adopted non-Indian members of the tribe. *See* 2 Op. Atty. Gen. 693 (1834); 7 Op. Atty. Gen. 174 (1855). *Id.* at 199. Even more importantly, there is no evidence in any

of this federal criminal documentation that the participants did not also share the presumption that the tribes did not have civil jurisdiction over non-Indians, absent congressional statute or treaty provision to that effect. *Id.* at 199.

For this reason, we agree with the "intellectual honesty" *supra*, professed by counsel for the Yakima Tribe in *Oliphant*. Tr. of Oral Argument, at 55, *Oliphant*, 435 U.S. 191. There was no principled way for the Court in *Oliphant* to recognize that Indian tribes have inherent criminal jurisdiction over non-Indians, and not also recognize equally extensive inherent tribal civil jurisdiction. Tr. of Oral Argument, at 54, *Oliphant*, 435 U.S. 191. More importantly now, in light of *Oliphant*, it should follow, we submit, that the same principles that precluded a recognition of inherent tribal criminal jurisdiction, also preclude a recognition of inherent tribal civil jurisdiction. Surely nothing in *Montana* detracts from this position:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, *the principles on which it relied support the general proposition* that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.[2]

Montana, 450 U.S. at 565 (emphasis added).

B. In *Montana* This Court Reaffirmed The Precedent And Further Delineated The Principles That Are Controlling Here.

1. *Precedent.*

Montana, importantly reaffirmed the basic premise of *Oliphant*, that tribal power inconsistent with dependent status cannot survive "without express congressional delegation". *Montana v. United States*, 450 U.S. 544, 564

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[2] *Also, see generally Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930); *Langford v. Monteith*, 102 U.S. 145, 147 (1880); *United States v. Quiver*, 241 U.S. 602, 605-06 (1916); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 501 (1946).

(1981).[3] Additionally, the Court parenthetically noted that subsequent to *Oliphant*, *United States v. Wheeler*, 435 U.S. 313 (1978), most recently reviewed principles of inherent sovereignty, and distinguished between those inherent powers retained by the tribes and those divested:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is *necessarily* inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.* (emphasis added)

Montana, 450 U.S. at 564 quoting *Wheeler* (emphasis as in original, except *necessarily*).

In addition to *Wheeler*, *Montana* further supported a rejection of sweeping treaty based arguments that "clashe[d] with subsequent history of the reservation" with the discussion of this point in *Puyallup III*, as well as detailed overview of the purposes and philosophy of the General Allotment Act. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165 (1977).[4] *See also Montana*,

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[3] *See Mescalero Apache Tribe v. Jones et al.*, 411 U.S. 145, 148 (1973); *Williams v. Lee*, 358 U.S. 217, 219-20 (1959); *United States v. Kagama*, 118 U.S. 375, 381-82 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973), as cited in *Montana*, 450 U.S. at 564.

[4] In *Puyallup III*, this Court, when confronted with a treaty provision similar to that involved here regarding "exclusive" use, found that because tribal lands had been alienated pursuant to congressional enactment "[n]either the Tribe nor its members continue to hold Puyallup River fishing grounds for their exclusive use. . . ." *Id.* at 174. The significance of *Puyallup III* with regard to the present case is that it unmistakably established that "exclusive" rights created by treaty—the basis asserted by the Tribe here—are effectively extinguished with the alienation of the lands to non-Indians. *Montana* expressly recognized and confirmed *Puyallup III* in this respect. *Montana*, 450 U.S. 560-61. Therefore, there is no "exclusive" right existent under the 1855 Treaty which would authorize the Yakima Tribe to regulate non-Indians on non-Indian owned land.

450 U.S. at 559-60 nn. 8-9, 561, citing *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962), and *Draper v. United States*, 164 U.S. 240 (1896), as well as contemporary congressional and other documentation.

The Court concluded in *Montana* by carefully extending the rule in *Oliphant* as a general proposition, and then noted the "consensual" exception, clarified by express citations, and the "threatens or direct effect" exception at issue here, again clarified by express citations. *Id.* at 565-66. Neither exception fit the circumstances presented, and the Court so stated. *Id.* at 566.

Here, the Court of Appeals, we submit, ignored the rule in *Oliphant*, and ignored *Montana*'s extension of *Oliphant* as a general proposition. In its stead, the Court of Appeals seized upon the "threatens or direct effect" exception, and *without any reference* to the accompanying express citations carefully set forth by the *Montana* Court, the Court of Appeals then proceeded to ignore even the scope and the essence of that exception. As a result, the Court of Appeals fashioned its own "tribal interest" test that at least arguably encompasses tribal regulation of any reservation activity by non-Indians. *Yakima*, 828 F.2d at 535. The Court of Appeals "tribal interest" test, moreover, presumes a retained inherent tribal sovereignty rejected by this Court in both *Oliphant* and *Montana*, and promises a virtually unending and limitless case-by-case exploration of the vistas of this novel "exception". This, we submit, was the fundamental error of the Court of Appeals.

2. *The Exception.*[5]

The *Montana* "threatened or direct effect" exception to the general proposition that "the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe", is straightforward and fundamental. The *Montana* Court directed attention to specific portions of four separate cases that analytically delineate the substance of this exception.

> *See Fisher v. District Court*, 424 U.S. 382, 386; *Williams v. Lee, supra*, at 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273.[15 6]

450 U.S. at 566. The Court of Appeals either refused or neglected to even *cite*, much less discuss, *any* of these four decisions or the principles for which they were cited. The exception thereby supplanted the rule.

a) "*Fisher v. District Court*, 424 U.S. 382, 386 (1976)." *Fisher* involved an adoption dispute arising on the reservation among reservation Indians. As the Tribal Court stated, the parties "are each and all members of the Northern Cheyenne Tribe and each and all reside within the exterior boundaries of the Northern Cheyenne Indian Reservation." 424 U.S. at 384 n. 5. In such a situation, federal policy "preempted" the state Court's jurisdiction. 424 U.S. at 390. Exclusive jurisdiction was in the tribal court.

Fisher, 424 U.S. at 386, cites *Williams v. Lee*, 358 U.S. 217, 220 (1959) and notes that "since this litigation involves only Indians, at least the same standard must be met before the state courts may exercise jurisdiction", further citing *Mescalero Apache Tribe v. Jones*,

[5] The Court of Appeals recognized that *Montana* set forth two exceptions; the "consensual" exception is not involved here. *Yakima*, 828 F.2d at 533-34.

[6] "As a corollary, this Court has held that Indian tribes retain rights to river waters necessary to make their reservations livable. *Arizona v. California*, 373 U.S. 546, 599." *Montana*, 450 U.S. at 566 n.15.

411 U.S. 145, 148 (1973) and *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168-173, 179-180 (1973). *Fisher*, 424 U.S. at 386. The *Fisher* Court also noted that the right of the Northern Cheyenne Tribe to govern itself independently of state law had "been consistently protected by federal statute." *Id.* at 386.

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Fisher* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 386.

b) "*Williams v. Lee*, 358 U.S. 217 at 220 (1959)." In *Williams*, a non-Indian sued a Navajo Indian and his wife in state court to collect for goods sold to them on the reservation where they lived. The Court noted that no Federal Act had given the state courts jurisdiction over such controversies and the issue was resolved. Exclusive jurisdiction was in the tribal court.

Williams v. Lee, 358 U.S. at 220, specifically cites a number of cases involving non-Indians where essential tribal relationships were not involved and where the rights of Indians would not be jeopardized. *Felix v. Patrick*, 145 U.S. 317, 332 (1892); *United States v. Candelaria*, 271 U.S. 432 (1926); *Harrison v. Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948); *New York ex rel Ray v. Martin*, 326 U.S. 496 (1946); *Donnelly v. United States*, 228 U.S. 243, 269-272 (1913); *Williams v. United States*, 327 U.S. 711 (1946). The Court in *Williams*, then states "absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. Cf. *Utah and Northern Railway Company v. Fisher*, 116 U.S. 28." *Id.* at 220. Further on, *Williams* concludes that Congress has also acted consistently upon the assumption that the states have no power to regulate the *affairs of Indians* on a reserva-

tion, citing 4 Stat. 729, 735, and the 1934 Wheeler Howard Act, 48 Stat. 987.

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Williams* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 220.

c) "*Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129 (1906)." The Court in *Catholic Missions* affirmed the dismissal on jurisdictional grounds of Catholic Missions' complaint seeking to recover taxes paid to a Montana county for an assessment on its cattle grazing on Indian land on an Indian reservation. It was alleged by Catholic Missions:

> That with a view to provide means for the carrying on of the said work of educating the said Indians the said Jesuit Fathers have acquired a large band of neat cattle, which roam over and feed upon the said reservation. That the right to keep and graze the said cattle upon the lands included within the said reservation was, long prior to the year 1895, granted to the Jesuit Fathers by the Indians residing upon the said reservation and entitled to reside thereon, which right was confirmed by the acquiescence and permission of the Government of the United States, and that the cattle now owned by them or by the plaintiff herein, as hereinafter set out, now graze upon the lands included within the said reservation by the express permission of the Indians residing and entitled to reside thereon, and of the Government of the United States.

Catholic Missions, 200 U.S. at 121-22. Initially, the Court noted:

> It is true that the property of Indians living in the tribal state, and so recognized by the Government, is withdrawn from the operation of state laws and is exempt from taxation thereunder. *The Kansas Indians*, 5 Wall. 737, 757; *United States v. Rickert*, 188 U.S. 432.

Catholic Missions, 200 U.S. at 127.

Catholic Missions, however, goes on to state that since the Indians had neither legal nor equitable title to the property in question, the cattle would not be exempt from taxation. *Id.* at 128-29. Further, the Court explained that it had previously determined:

> that the Indians' interest in this kind of property, situated on their reservations, was not sufficient to exempt such property, when owned by private individuals, from taxation. *Thomas v. Gay*, 169 U.S. 264; *Wagoner v. Evans*, 170 U.S. 588 . . . the tax put upon the cattle of the lessees was *too remote and indirect* to be deemed a tax upon the lands or privileges of the Indians . . .

Catholic Missions, 200 U.S. at 127 (emphasis added).

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe", nothing in *Catholic Missions* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 127-28.

d) "*Thomas v. Gay*, 169 U.S. 264, 273 (1898)." In *Thomas*, the territory of Oklahoma attempted to tax cattle grazing on reservation lands leased, pursuant to congressional authorization, by Indians to non-Indian cattlemen.

Thomas, 169 U.S. at 273, cites *Utah and Northern Railway Company v. Fisher*, 116 U.S. 28 [29; 542] (1885), and *Maricopa and P. Railroad Company v. Arizona*, 156 U.S. 347 [39;447], with approval. In those cases, the Court noted it held that:

> "the property of railway companies transversing Indian reservations are subject to taxation by the states and territories in which such reservations are located."

Thomas, 169 U.S. at 273. The *Thomas* Court then concluded it was:

> obvious that a tax put upon the cattle of the lessees is *too remote and indirect* to be deemed a tax upon the lands or privileges of the Indians.

Thomas, 169 U.S. at 273 (emphasis added).[7]

In context, i.e., as a specific exception to *Montana*'s "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities and nonmembers of the Tribe", nothing in *Thomas v. Gay* arguably supports the analysis or the holding of the Court of Appeals. *Id.* at 273.[8]

e) With the exception in mind, namely, that a tribe *may* retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe", *Fisher*, *Williams*, *Catholic Missions*, and *Thomas*, can be viewed collectively as opinions that delineate state and tribal jurisdiction. One view would be that in *Fisher* and *Williams*' situations, such as adoptions involving tribal members on the reservation and contracts involving tribal members on the reservation, or in other matters of similar intimate tribal relations, a tribal forum rather than a state forum is essential. On the other hand, *Catholic Missions* and *Thomas* unquestionably

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[7] *See also Wagoner v. Evans*, 170 U.S. 558, 591 (1898): "It is, indeed, contended that to permit the territory to tax the cattle would tend to discourage the making of such leases, and thus deprive the Indians of the advantages coming to them. *This seems to us too indirect and far-fetched an incident to affect our conclusions.*" (Emphasis added.)

[8] *Also see, Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 183-184 n.8 (1980) (Justice Rehnquist concurring and dissenting), where *Thomas v. Gay* was noted to be "part of the backdrop" which supports a state's power. Also, "*Thomas v. Gay* stands as the traditional analysis of Indian sovereign immunity held to be relevant in *McClanahan*." *Id.* at 184 n.8.

stand for the proposition that the conduct of non-Indians, even when it touches upon tribal interests, is far too remote and too indirect for the restrictions limited to purely tribal concerns to apply.

When involved in *Fisher* and *Williams*' situations, a non-member is unquestionably within the purview of the tribal restrictions. But in *Catholic Missions* and *Thomas* situations, the inherent power of the tribe does not reach and cannot preclude the proper scope of the jurisdiction of the state. Delineation, rather than balancing "tribal interest", appears to be the appropriate focal point of the *Montana* exception. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 176 (1980) (Rehnquist, J., concurring and dissenting).

Other views on the interplay of *Fisher*, *Williams*, *Catholic Missions*, and *Thomas* are certainly possible. But it is improbable that such views can, in any way, enhance the analysis or the holding of the Court of Appeals.

C. Nothing In *National Farmers Union* Or *Iowa Mutual* Detracts From The Clear Principles Established In *Oliphant* And *Montana*.

1. *National Farmers Union*.

In *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court addressed the scope of *Oliphant* in a different context, not at issue here. The opinion is still important and instructive however, for several reasons.

In the first place, *National Farmers Union* details the history of tribal sovereignty and the instances in which this Court has been requested to decide the extent to which Indian tribes have retained the power to regulate the affairs of non-Indians. *Id.* at 851-52, and nn. 12-14. Next, the opinion responds to an argument advanced by Petitioner in *National Farmers Union* that *Oliphant* rendered exhaustion in tribal courts as a matter of comity "manifestly inappropriate". 471 U.S. at 845. In effect, the Court was asked to automatically extend

Oliphant and foreclose the issue, and the Court refused. 471 U.S. at 853. In this context, the response of the Court to *Oliphant* is quite limited and unquestionably appropriate. It is obvious that *National Farmers Union* was not intended to undermine the principles of *Oliphant* (or *Montana*) in any way.[9] Yet, this is precisely the manner in which it has been recently used.

Part of the problem also apparently stems from the *Brief for the United States* submitted in *National Farmers Union*. The United States argued strenuously against the holding of the Court in *Oliphant* at the time, and as an acknowledged advocate in support of tribal civil jurisdiction over non-Indians in *National Farmers Union*, the United States understandably presented a very narrow view of this Court's *Oliphant* opinion. (Though not as narrow a view as in *Montana*, when the United States did not bother to even cite *Oliphant*). *Brief for the United States, Montana v. United States*, 450 U.S. 544 (1981). As a result, the *Brief for the United States*, at 14, in *National Farmers Union* sets forth and relies primarily on only those portions of the *Oliphant* opinion that indicate the Court's consideration of documents involving federal criminal preemption. The remainder of the *Oliphant* opinion, did not, we submit, receive the thorough attention it reserves. *See* discussion of *Oliphant*, in *National Farmers Union*, 471 U.S. at 854-56.

Similarly deserving of more thorough treatment, is the Opinion of the Attorney General of the United States also discussed in the *Brief for the United States, as Amicus Curiae*:

> Our history of Indian affairs indicates that the absence of tribal criminal jurisdiction over non-Indians is no basis for disabling Indian Tribes from exercising civil jurisdiction over non-Indians. . . . But there is nothing comparable on the civil side. Except for a brief and unusual transitional period in the Indian Territory (note 6, *infra*), no treaty nor statute has ever provided for federal adjudication of Reservation-based civil cases involving non-Indians. On the contrary, the *different rule applicable in respect of tribal assertions of civil jurisdiction was expressly noted as* early [as] 1855 in an Opinion of the Attorney General cited by this Court in *Oliphant*. 7 Op. Att'y Gen. 174, cited, 435 U.S. at 199.

[9] *See Iowa Mutual*, 107 S.Ct. at 979 (Stevens, J. dissenting).

Brief for the United States as Amicus Curiae, at 14-15, *National Farmers Union* (emphasis added). *Oliphant* certainly cited this Opinion, but not for this proposition. The *Brief for the United States as Amicus Curiae*'s "different rule applicable in respect of tribal assertions of civil jurisdiction", we submit, is in this instance premised on a difference without a distinction. The United States neglected to mention that the Opinion involved an *adopted member of the Choctaw Nation*. The Attorney General of the United States did not.

> Congress has seen fit to withhold from the Choctaw nation all criminal jurisdiction over white men within their territory, but not to withhold from them civil jurisdiction over *such white men as of their own free will and accord choose to become members of the nation.*

7 Op. Att'y Gen. 174, 185 (emphasis added). *See also* 7 Op. Atty. Gen. at 178, 181.[10] In context, the opinion of

[10] Apart from the point here, this Court has appropriately cautioned, in another context, the limited utility of arguments founded on historical Indian territory documentation ("very peculiar circumstance"):

> Neither the special historical origins of the Choctaw and Cherokee treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from state jurisdiction in those treaties have any counterparts in the terms and circumstances of the Crow treaties of 1851 and 1868.

Montana, 450 U.S. at 556-57 n.5. *Amici* certainly agree with this analysis and would further note that even the United States, when it suits its purpose, makes this same argument. *See* "unusual transitional period", "awkward circumstances" and "exceptional situation" referred to by United States in the *Brief of the United States, National Farmers Union*, 14, 15-16 n.6. This back-

the Attorney General thus puts the support for the "different rule" in a different light. Moreover, because this entire argument is set forth verbatim in the Strickland edition of Felix Cohen's *Federal Indian Law*, 252-57 (1982), (a tribal advocacy treatise in the opinion of many), the United States should share credit. To the extent that the Opinion in *National Farmers Union* relied on any of this, even by way of *dicta*, should really be of no consequence, for the reasons just discussed. *National Farmers Union*, 471 U.S. at 853-55.

The Opinion of the Court in *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), however, uses this aspect of *National Farmer Union*, by way of *dicta*, to further advance the "different rule" argument:

> Although the criminal jurisdiction of the tribal courts is subject to substantial federal limitation, see *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), *their civil jurisdiction is not similarly restricted. See National Farmers Union*, 471 U.S., at 854-855, and nn. 16 and 17, 105 S.Ct., at 2453 n. 16 and 17.

107 S.Ct. at 976 (emphasis added). *Amici* doubt that *National Farmers Union* can fairly be read to support this proposition, and *National Farmers Union* is all *Iowa Mutual* cited in support of it.

2. *Iowa Mutual.*

The Court in *Iowa Mutual Insurance Co. v. LaPlante*, 107 S.Ct. 971 (1987), was presented with a question of relatively narrow scope: whether the exhaustion rule announced in *National Farmers Union* would apply when diversity, rather than the existence of a federal question, was alleged as the basis for federal jurisdiction. *Iowa Mutual* resolved the issue in favor of an extension of the exhaustion rule. *Id.* at 976-77. The principle concern

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drop should shed further light on *Morris v. Hitchcock*, 194 U.S. 384 (1904) and *Buster, et al. v. Wright, et al.*, 135 F. 947 (8th Cir. 1905), app. dismissed, 203 U.S. 599 (1906).

with *Iowa Mutual* relates not to this holding, but rather to the manner in which the Court set forth another statement relating to tribal civil jurisdiction over non-Indians. Even this aspect of the Opinion, however, is not as problematic as some would like it to be. In context, the Court did nothing more than simply recount prior decisions of this Court.

The sentence at issue appears in the Opinion in response to Petitioner's argument that the statutory grant of diversity jurisdiction overrides the federal policy of deference to tribal courts. The Court initially pointed out:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-2081, 65 L.Ed.2d 10 (1980); *Fisher v. District Court*, 424 U.S., at 387-389, 96 S.Ct., at 946-947. Civil jurisdiction over such activities *presumptively* lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute. . . .

Iowa Mutual, 107 S.Ct. at 978 (emphasis added). And then the Court concluded:

> . . . In the absence of any indication that Congress intended the diversity statute to limit the jurisdiction of the tribal courts, we decline petitioner's invitation to hold that tribal sovereignty can be impaired in this fashion.

Iowa Mutual, 107 S.Ct. at 978.

In this format, any tribal civil jurisdiction over the activities of non-Indians served the purpose for the point the Court was trying to make. This fact alone should answer those who seek to fashion a "presumption" in favor of tribal civil jurisdiction over the activities of non-Indians on fee lands from this single sentence. 107 S.Ct. at 978.

If it does not, secondly, "such activities" ordinarily, and therefore presumably, would refer to only those activities cited at the end of the immediately preceding sentence. And there can be no problem with this limited presumption. "*Montana v. United States*, 450 U.S. 544, 565-566, 101 S.Ct. 1245, 1258-1259, 67 L.Ed.2d 493 (1981); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-153, 100 S.Ct. 2069, 2080-2081, 65 L.Ed.2d 10 (1980); and *Fisher v. District Court*, 424 U.S. at 387-389, 96 S.Ct. at 946-947" are all acceptable limitations. Nor should there be a problem with any requirement for limitation by treaty or federal statute. Such a limitation is the express basis for the holdings in both *Oliphant* and *Montana*. To the extent that the entire "presumption" argument appears to be "much adieu about nothing", *amici* agree. It is, however, at least indicative of the rather tenuous arguments that must be relied on to support tribal civil jurisdiction over non-Indians on fee lands. Justice Marshall's singular sentence was not intended to create such a "presumption" and such a presumption does not exist.[11] Reliance by the Court of Appeals or anyone else on this aspect of *Iowa Mutual*, is simply misplaced. *Yakima*, 828 F.2d at 533.

D. The Treaty Arguments Of The Yakima Tribe Were Correctly Rejected In Both *Oliphant* And *Montana*.

Oliphant and *Montana* are also instructive in other significant respects. Most importantly, the Yakima Tribe cannot point to any specific treaty provision or statute in substantial support of their authority, that this Court has not addressed, considered and soundly rejected in

[11] "A presumption in favor of any inherent, general jurisdiction for tribal courts is wholly inconsistent with the juridical relations between the federal government and the Indian tribes that has existed for the past 100 years." *Oliphant*, 544 F.2d at 1019 (Kennedy, J. dissenting). *See also Montana*, 450 U.S. at 564-66; Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right of Congressional License?* 51 Notre Dame Law. 600, 627 (1976).

either *Oliphant* or *Montana*. *Oliphant*, 435 U.S. at 197-99; *Montana*, 450 U.S. at 557. *See also Puyallup Tribe v. Washington Game Dept.*, 433 U.S. at 174-7 (1977) (*Puyallup III*). On the Treaty with the Yakima, the Court of Appeals could only say:

> Yakima Nation derives authority not only implicitly from its status as a dependent sovereign, but explicitly from the Treaty with the Yakimas, 12 Stat. 951, 2 Kapplers [698] (1855), in which Yakima Nation and the United States agreed that Yakima Nation reserved to itself and was guaranteed a right to its "own government" and its "own laws."

Yakima, 828 F.2d at 529. Even if the *treaty* did make a reference to its "own government" and its "own laws", which it does not, such a reservation could not make a difference in this instance, not even in isolation. In the historical context described in *Oliphant* and *Montant*, it is of even less significance. Here, as in *Montana*, the "treaty nowhere suggested that Congress intended to grant authority to the Tribe to regulate . . .". 450 U.S. at 558.

The rest of the general treaty arguments, i.e. "the exclusive use" and "without permission" clauses and so forth, are also addressed by both *Puyallup III* and *Montana*. *Puyallup*, 433 U.S. at 174-77, *Montana*, 450 U.S. at 558-63. "[T]reaty rights with respect to reservation lands *must* be read in light of the subsequent alienation of those lands." 450 U.S. at 561 (emphasis added) citing *Puyallup III* with approval. This, the Court of Appeals also refused to do, which brings us to the General Allotment Act of 1887, 24 Stat. 388.

II. THE LEGISLATIVE HISTORY OF THE GENERAL ALLOTMENT ACT CONFIRMS CONGRESS NEVER INTENDED INDIAN TRIBES TO HAVE CIVIL JURISDICTION OVER NON-MEMBERS ON FEE LANDS

The Court of Appeals cited several *recent* statutes in support of a federal policy that informed "their inquiry concerning the reach of tribal sovereignty". 828 F.2d at

533. The Court of Appeals did not cite the General Allotment Act of 1887 and did not discuss or even acknowledge the federal policy, repeatedly acknowledged by this Court, that it represents. The very presence of non-Indians on fee lands in the Yakima Reservation tracks the application of this Act to the Yakima Reservation. *Oliphant*, *Puyallup*, *Montana* and other recent decisions of this Court attest the importance of several facets of this historical fact.

This Court in *Oliphant* began with a detailed discussion of this point:

> The Squamish Indian Tribe, unlike many other Indian tribes, did not consent to non-Indian homesteading of unallotted or "surplus" lands within their reservation pursuant to 25 U.S.C. § 348 [General Allotment Act] and 43 U.S.C. §§ 1195-1197. Instead, the substantial non-Indian population on the Port Madison Reservation is primarily the result of the sale of Indian allotments to non-Indians by the Secretary of the Interior. Congressional legislation [General Allotment Act] has allowed such sales where the allotments were in heirship, fell to 'incompetents," or were surrendered in lieu of other selections. *The substantial non-Indians landholdings on the Reservation is also a result of the lifting of various trust restrictions, which has enabled individual Indians to sell their allotments. See* 25 U.S.C. §§ 349, 392 . . . [General Allotment Act].

435 U.S. at 193 n.1 (emphasis added). It would also appear that the Yakima Tribe, like the Suquamish Indian Tribe, did not consent to actual homesteading of unallotted surplus lands. The non-Indians' presence in the Yakima Indian Reservation, therefore, like the presence of non-Indians in the Suquamish Port Madison Reservation, at a minimum, tracks those provisions of the General Allotment Act noted in the Congressional legislation referred to by *Oliphant* (particularly as emphasized, *supra*). This fact should have at least been acknowledged by the Court of Appeals.[12]

In addition, in 1904, Congress passed a surplus land statute specifically applicable to the Yakima Reservation. 33 Stat. 595. This 1904 Act provided in relevant part:

> That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the state of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June nine, eighteen hundred and fifty-five. . .

33 Stat. 595.[13] Although the precise status of this Act is not entirely clear, this Court cited this portion of the text of the Act in an unrelated conflict between the United States and the Northern Pacific Railroad Company in 1913. *Northern Pacific Railroad Company v. United States*, 227 U.S. 544, 547 n.1 (1913). And, the applicability of the General Allotment Act to timberlands within the Yakima Reservation was decided in 1924 by this Court in *United States v. Payne*, 264 U.S. 446, 447-48 (1924).

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[12] Some of this early history of allotment and application of the General Allotment Act to the Yakima Reservation is noted in *United States v. Sutton*, 215 U.S. 200, at 200-01 (1909). *See generally United States v. Winans*, 198 U.S. 371, (1905) *Washington v. Yakima Nation*, 439 U.S. 463 (1979), *United States v. Solomon*, 753 F.2d 1522 (1985) and *Holly v. Totus*, No. 85-4436, *cert. denied*, 94 L.Ed. 2d 47 (1987). *See also United States v. Pelican*, 232 U.S. 442 (1914).

[13] *See* S. Rep. No. 2738, 58th Cong., 3d Sess. 4 (1904), Appendix A *infra*, which states in part:

> No agreement has been made with these Indians, and their consent has not been secured for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government.

See also Pfaller, *James McLaughlin, The Man with an Indian Heart*, 224-26 (1978).

The silence of the Court of Appeals regarding the General Allotment Act and Yakima Reservation is especially disturbing in light of the decisions in *Montana. United States v. State of Montana*, 604 F.2d 1162 (9th Cir. 1979); *Montana v. United States*, 450 U.S. 544 (1981). In its decision in *Montana*, the Court of Appeals acknowledged that the General Allotment Act implicitly deprived the tribes of the authority to prohibit certain activities of resident non-members. 450 U.S. at 550. One would logically expect that principle, at the very least, to be addressed below and it is not. After this Court in *Montana* expressly disagreed with the restricted view of the Court of Appeals of this issue, the silence becomes more than inexplicable. 450 U.S. at 559-60 n.9 In effect, it undermines the credibility of the entire opinion.

The significance of the General Allotment Act and the conclusions of this Court are set forth and documented in detail in *Montana*, 450 U.S. at 559-60 n.9 The conclusion of this Court regarding the overall effect of the land alienation occasioned by the policy of the General Allotment Act on Indian treaty rights tied to Indian use and occupation of reservation land is equally relevant here:

> It defies *common sense* to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

Montana, 450 U.S. at 560 n.9 (emphasis added).

Any argument that this Court's conclusion in this regard was lightly made or subsequently narrowed,[14] must necessarily overcome substantial obstacles—not the least of which is a consideration of the number of occas-

[14] The United States has already suggested that *New Mexico v. Mescalero Tribe*, 462 U.S. 324, 331 n.12 (1983) "narrowed" the *Montana* decision. *Brief for the United States* at 18 n.9, *National Farmers Union.*

sions this Court has recently been presented with extensive General Allotment Act questions. In both *DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip, et al.*, 430 U.S. 584 (1977), the arguments centered around a construction of decades of General Allotment Act primary source documentation. The opinions of the Court reflect a consideration of the issues in precisely those terms. In *Puyallup Tribe, Inc. v. Washington Game Dept.*, 433 U.S. 173 (1977) (*Puyallup III*), *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), other aspects of the General Allotment Act were also briefed and presented to this Court.[15]

In sum, *amici* does not doubt that this Court has more than sufficient reasons to support its conclusions in this regard. Still, it would not be entirely inappropriate to end the argument here where it really begins—with a brief review of the circumstances surrounding the enactment of the General Allotment Act of 1887.

Some cases in federal Indian law tend to be complex, but our position here is straightforward. Congressional intent, as reflected in the enactment of the General Allotment Act is a critical consideration. And here we can follow a path clearly marked by the prior decisions of this Court.

The policy of the federal government to be implemented by the operation of the General Allotment Act was the "civilization" and eventual assimilation of the Indian population, and the "gradual extinction of Indian reservations and Indian titles". *Draper v. United States*, 164 U.S. 240, 246 (1896); *Organized Village of Kake v. Egan*, 369 U.S. 60, 72 (1962). *Montana* noted these cases at the very beginning of the discussion. 450 U.S. at 559 n.9. More cases could have been cited in support of a recognition of these principles as well. *See supra.*

[15] *Also see Mattz v. Arnett*, 412 U.S. 481 (1973), and *Solem v. Bartlett*, 465 U.S. 463 (1984).

Montana also set forth the legislative history of the General Allotment Act and much of the material that follows.[16] What the Court said then is worth repeating now:

> There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction.

Montana, 450 U.S. at 560 n.9. *Amici* agree. Congress did not intend that non-Indians who settled upon alienated allotted or surplus lands would be subject to the civil jurisdiction of Indian tribes.

Perhaps there were reasons for the Court of Appeals not to address the General Allotment Act or any of the congressional materials set forth in *Montana*. We are not so certain. One thing, however, is certain. The decision below has condemned the non-Indians in these areas, and state and local governments, to endless rounds of needless litigation, in tribal, state and federal court, in order to sort out the details of who regulates what and whom within the limits of a new and novel "tribal interest" test. However, Congress played a role in this process. That, we submit, should be reason enough for this Court to reverse the Court of Appeals.

> Adherence to these principles of construction maximizes the ability of States and tribes to determine the scope of their respective authority without resort to adjudication, and maximizes judicial deference to the legislative forum.

Washington, 447 U.S. at 181 (Rehnquist, J., concurring and dissenting).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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[16] *See* Appendix B, *infra*, for the legislative history of the General Allotment Act submitted in *Montana*.

Respectfully submitted,

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September 2, 1988

APPENDICES

APPENDIX A

58the Congress, *3d Session.* SENATE Report No. 2738.

SALE AND DISPOSITION OF SURPLUS OR UNALLOTTED LANDS OF THE YAKIMA INDIAN RESERVATION, WASH.

DECEMBER 12, 1904.—Ordered to be printed.

Mr. GAMBLE, from the Committee on Indian Affairs, submitted the following

REPORT.

[To accompany H. R. 14468.]

The Committee on Indian Affairs, having had under consideration the bill (H. R. 14468) to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington, recommended that the same do pass.

A bill (H. R. 13522) to authorize the sale and disposition of surplus or unallotted lands of the Yakima Indian Reservation, in the State of Washington, was referred by the Committee on Indian Affairs of the House to the Secretary of the Interior for a report thereon. A report was made upon said bill by the Department and certain amendments were suggested. The suggestions of the Department were adopted and the bill changed to conform thereto and was introduced as H. R. 14468.

The report of the Committee on Indian Affairs of the House is very full and complete, setting forth the proviisons of the bill and the necessity for the proposed legislation. The report thereon by the Committee of the House is adopted as a part of this report.

HOME REPORT

The Yakima Indian Reservation was established by treaty under date of June 9, 1855. For many years the Indians have claimed that the boundary lines of said reservation as laid out are incorrect and that their reservation includes more lands than have been embraced within the recognized limits of their reservation. Under direction of the Secretary of the Interior, Mr. E. C. Barnard, of the Geological Survey, during the year 1899, made an investigation of the claims of the Indians and found that the Yakima Indians were entitled to land estimated to contain about 357,878 acres according to the terms of the treaty. . . .

This reservation, as heretofore defined, contains about 800,000 acres, of which nearly 300,000 have been allotted to the Indians. This bill proposes to recognize the validity of the claim to the tract of land adjoining the reesrvation to the extent of 293,837 acres, and of this land about 78,486 acres have been entered under the various land laws, and it is proposed that the rights of these settlers and purchasers shall not be interfered with, leaving approximately 715,351 acres to be disposed of under the terms and provisions of this bill.

Section 1 of the bill authorizes and directs the Secretary of the Interior to sell or dispose of the unallotted lands in the Yakima Indian Reservation, and recognizes the claim of the Indians to the tract adjoining their present reservation on the west, according to the findings of Mr. E. C. Barnard, and said tract is regarded as a part of said reservation for the purposes of this act. It also provides that where valid rights have been acquired prior to March 5, 1904, the date of the introduction of the first bill providing for the opening of these lands, to lands within said tract by bona fide settlers or purchasers under the public land laws such rights shall not be abridged. It also provides that the claim of the Indians to such lands shall be considered as fully

compensated for by reason of the expenditure of large sums of money on said Yakima Reservation for the benefit of these Indians. A little over 78,000 acres have been taken out.

This land is largely grazing land and sparsely timbered. The Government has expended many thousands of dollars for the benefit of these Indians in the past, and last year the sum of $45,000 was est aside for the construction of an irrigation ditch to water the Indian lands. This will be of very great benefit to the Indians, and your committee feel that it is but just and fair that these moneys should be set off against the lands taken out of the disputed tract, and they consider this full compensation for the claims of the Indians to such lands.

Section 2 provides that allotments shall be made to any Indians entitled thereto, including children now living born since the completion of existing allotments and who have not already received allotments. The Secretary also may reserve such lands as he may deem necessary or desirable in connection with irrigation systems for agency, school, and religious purposes, and such grazing and timber lands as he deems best for the uses of the Indians in common, provided he may dispose of such lands from time to time under the terms of the bill if he may deem best.

Section 3 provides for the classification of the lands by the Secretary of the Interior as irrigable, grazing, timber, mineral, and arid lands, and provides for their appraisement by legal subdivisions, except that the mineral lands need not be appraised and the timber lands shall be appraised separately. The basis for the appraisal of the timber shall be the amount of standing merchantable timber thereon. When the classification and appraisement is completed the lands shall be disposed of under the general provisions of the homestead laws of the United States, and shall be open to settlement and entry, at not less than their appraised value, by proclamation of the

President. The proclamation shall prescribe the manner in which the lands shall be settled on, occupied, or entered, and no person shall be permitted to settle upon, occupy, or enter any of the said lands except as prescribed in such proclamation uuntil after the expiration of sixty days from the time when the same are opened for settlement. The rights of Union soldiers and sailors of the civil and Spanish wars and the Philippine insurrection shall not be abridged.

* * * *

Section 4 provides that the proceeds arising from the sale or disposition of the lands aforesaid, including the sums paid for mineral lands, exclusive of customary fees and commissions, shall, after deducting the expenses incurred from time to time in connection with the appraisement and sales, be deposited in the Treasury of the United States to the credit of the Indians belonging to and having tribal rights on the Yakima Reservation, to be expended for their benefit under the direction of the Secretary of the Interior in the construction, completion, and maintenance of irrigation ditches, purchase of wagons, horses, farming implements, materials for houses, and other necessary and use ful articles as may be deemed best to promote their welfare and aid them in the adoption of civilized pursuits and in improving and building homes for themselves. It authorizes the payment in cash to the Indians per capita, share and share alike, if the Secretary deems it best, but not otherwise.

* * * *

The reservation is a treaty reservation, and this bill recognizes not only the right of the Indians to the use and occupancy of the lands, but in effect recognizes the title of the Indians to the lands and secures to them the entire proceeds arising from the sales made. It is very proper that the expenses necessarily incurred in disposing of these lands shall be defrayed out of the proceeds of the sales. A long-standing dispute between the Government and the Indians is settled and the title of the Indians to

the lands claimed by them is recognized, and, instead of the Government being required to pay the Indians a large sum of money for the disputed tract, the Indians will receive whatever these lands bring under the terms of this bill. No agreement has been made with these Indians, and their consent has not been secured for the opening of the reservation and the disposal of the unallotted lands. The failure to secure such consent or agreement, however, does not rest with the Government.

Repeated attempts have been made to reach an agreement with these Indians and very liberal terms have been offered, but the Indians have declined to enter into such an agreement. The Crow-Flathead, etc., Commission negotiated with these Indians from time to time from 1896 until 1901, when the commission was discontinued. Since then special agents of the Government have endeavored to make a satisfactory agreement, but have failed. Under these circumstances your committee do not feel that further negotiations should be carried on in order to secure the consent of the Indians.

This reservation is situated about 4 miles from North Yakima, a city with a population of about 7,000 people. It is located in the very heart of the irrigated district of Yakima County, and of the State of Washington, and is a very great hindrance to the continued and complete development of that country. With so large a body of land as that held from settlement and cultivation, settlement and growth can not help but be retarded. We believe it to very important that this reservation should be opened at once.

The provisions of the bill with reference to the appraisement and classification are very important. The lands of this reservation are of a varied character. Much of them are arid, sage-brush lands; some of this can be watered, and when this is done the land is of very great value. Some of it, however, is not likely to be watered for

many years, and naturally this is of little worth. Some of the land nearer the mountains is fairly good grazing land, and there is some tolerably good timber, rather remote, however, from transportation. These various conditions make it very necessary that much latitude shall be given the Department in the disposition of the lands, and the provisions of the bill in this respect are absolutely necessary by reason of these various conditions.

APPENDIX B

[EXCERPTS OF ARGUMENT]

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and
THE CROW TRIBE OF INDIANS, MONTANA,
Respondents,

vs.

THE STATE OF MONTANA, MONTANA STATE FISH and GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMICI CURIAE STATE OF MINNESOTA and MINNESOTA COUNTIES OF BECKER, BELTRAMI, CASS, CLEARWATER, KOOCHICHING, LAKE OF THE WOODS, MAHNOMEN and PENNINGTON

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* * * *

IV. THE GENERAL ALLOTMENT ACT ABROGATED ANY AUTHORITY WHICH THE CROW TRIBE ORIGINALLY MIGHT HAVE HAD TO REGULATE HUNTING AND FISHING BY NON-INDIANS ON NON-INDIAN LAND.

As early as 1880, bills were introduced in Congress which provided generally for the allotment of reservation lands to Indians.[11] In 1881 a bill substantially similar to the General Allotment Act (S. 1773) was debated extensively in the Senate.[12] From the outset of and throughout the debates respecting the 1881 bill, it was clearly understood by all the members of the Senate that the purpose of the bill was to civilize the Indian population of the country and this was to be accomplished in part by the dissolution of tribal relations.[13] For example, Senator Saunders stated early in the debates on S. 1173 as follows:

> Heretofore we have recognized the tribal relations. . . . But now a new order of things is about to be established, as I understand. The people of this country are in favor largely, in my opinion, of giving the Indians the rights of citizenship, of making them citizens, and requiring of them all that is required of others . . . .
>
> * * * *
>
> I only wanted to say that I favor the principle of the bill, that I wish it to be known that I am in

[11] *See* H.R. 5038, 46 Cong., 2nd Sess. (1880); S. 1773, 46th Cong., 3d Sess. (1880).

[12] *See* ***United States v. Mitchell,*** —— U.S. ——, 100 S.Ct. 1349, 1354, n.4 (1980).

[13] *See e.g.*, XI Cong. Rec. 779 (Sen. Vest), 782 (Sen. Coke), 783-84 (Sen. Saunders), 785 (Senators Morgan and Hoar), 881 (Sen. Brown), 906 (Sen. Butler), 939 (Sen. Teller), 1003 (Sen. Morgan), 1028 (Sen. Hoar), 1064 and 1065 (Sen. Plumb), 1067 (Sen. Williams).

> favor of dividing the lands up into severalty to these people, and in favor of the earliest possible breaking up of the tribal relation and making them citizens in every sense of the word.

XI Cong. Rec. 783-84.

As part of the effort to civilize the allottees, it was expressly provided in the bill that upon issuance of the patent for the allotment, the allottee was to become subject to the laws of the territory or state in which the allotment was situated.[14] What is significant about this provision for purposes of this case is that the allotment of lands and the resultant extension of state law was consistently equated with the dissolution of tribal affairs; that is, the extension of state jurisdiction was to result in the termination of tribal jurisdiction.[15] Thus, it was understood and intended that with the extension of state or territorial jurisdicion upon issuance of a patent, the tribal relations of the allottees were to be, in effect, terminated.[16]

[14] *S. 1773, supra* at § 6. *See* XI Cong. Rec. 778-79 (Sen. Coke), 875 (Sen. Hoar), 878 (Sen. Coke), 1029 (Sen. Plumb), 1066 (Sen. Kerman), 1067 (Sen. Morgan).

[15] *See, e.g.,* XI Cong. Rec. 785 (Sen. Morgan), 875 (Sen. Hoar), 878 (Senators Hoar and Coke), 881 (Sen. Brown), 908 (Sen. Call), 939 (Sen. Teller), 1028 (Sen. Hoar), 1067 (Senators Edmunds and Williams). As Senator Hoar pointed out during the course of the debates on S. 1773.

> An Act of Congress may undoubtedly take away that shield, may destroy the tribal relation, and very likely do what this statute in express terms undertakes to do—that is, subject the Indian to State law . . . .
>
> * * * *
>
> So if you make an Indian subject to the law of the State, it is not by limiting or by extending the operation of that law; it is by taking away from the Indian the tribal character . . . .

XI Cong. Rec. 1028.

[16] *See e.g.* XI Cong. Rec. 875 (Sen. Hoar), 876 (Sen. Morgan).

The significance of the foregoing discussion to the present case is readily apparent. It is unreasonable to conclude that Congress intended to terminate tribal authority over individual Indian allottees and at the same time subject non-Indian settlers to tribal jurisdiction. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. at 203 (discussion respecting significance of 1854 Amendment to the Trade and Intercourse Act). Moreover, it is unlikely that Congress intended that non-Indians entering the reservation would be subject to tribal jurisdiction since the avowed purpose of the bill was, in part, the ultimate destruction of tribal government.[17] Nowhere in the debates on S. 1773 is there any mention or implication of an understanding that the incoming settlers would be subject to tribal jurisdiction.[18] If Congress had con-templated that tribal jurisdiction would extend to non-Indians, express mention would have certainly been made of such. To the contrary, however, repeated references were made during the debates to making Indian allottees amenable to the laws which governed the incoming settlers.

[17] In addition, Congress intended that civilization of the Indian population would be facilitated in part by non-Indians who would settle upon the surplus and alienated allotted lands and would thus expose the allottees to the way of civilization. *See e.g.*, XI Cong. Rec. 876 (Sen. Morgan), 877 (Sen. Hoar). *See also* XVII Cong. Rec. 1762-63 (Senators Teller and Dawes); Report of the Secretary of the Interior (1891), p. VI; Report of the Commissioner of Indian Affairs (1891), pp. 46-47; Report of the Secretary of the Interior (1892), p. XXXIII. It would be incongruous for Congress at the same time to intend that the tribes exercise authority over the non-Indians on the fee patented lands.

[18] It must have been contemplated by Congress that the opening of the vast territories encompassed by the Indian reservations to eventual non-Indian settlement could lead to the development predominantly non-Indian towns and communities. In fact, to aid the efforts to settle the vast territories opened during this era, Congress enacted legislation permitting right-of-ways for highways to be established on Indian lands and the condemnation of individual Indian lands for public purposes. Act of March 3, 1901, 31 Stat. 1084, §§ 3 and 4, 25 U.S.C. §§ 311, 357.

Additionally, it is evident from the debates on S. 1773 and similar bills debated in later sessions that Congress knew and understood that after the 25-year alienation restriction had expired, much of the allotted lands would pass to non-Indian ownership. *See e.g.*, XI Cong. Rec. 783 (Sen. Teller), 882 (Sen. Brown), 934 (Sen. Hoar); XVIII Cong. Rec. 974 (Sen. Dolph). *See generally* Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 506-07 (1979).

Review of the legislative materials pertinent to subsequent versions of S. 1773 reveals that the underlying understanding evidenced in regard to that bill prevailed in Congress and thus was carried forth and enacted in the General Allotment Act.[19] For example, Representative Skinner, one of the sponsors of the General Allotment Act in the House of Representatives, stated as follows:

> This means that the tribal relations must be broken up; that the practice of massing large numbers of Indians on reservations must be stopped; that lands must be allotted in severalty. . . .
>
> . . . . Let him [the Indian] become a citizen of the United States and be taught by contact with the white man. And in addition thereto give him his land as is provided in this bill *and extend over him and his property the same protection that is accorded to white men*. . . .

XVIII Cong. Rec. 190-91 (emphasis added.) In addition, it was recognized in the Senate that the bill then before

[19] *See e.g.*, XIII Cong. Rec. 3211 (Sen. Conger) and 3212 (Senators Conger and Dawes) (1882); XIV Cong. Rec. 2279-80 (Sen. Coke), 2280 (Senators Dawes and Call) (1884); XVII Cong. Rec. 1630 (Sen. Dawes), 1632 (Sen. Maxey), 1634-35 (Sen. Maxey), and 1762 (Sen. Teller) (1886); XVIII Cong. Rec. 190 (Rep. Skinner), and 191 (Representatives Skinner and Perkins) (1886).

Additionally, S. 1773 was similar to the General Allotment Act in most significant respects. In later sessions, bills essentially identical to the 1887 Act were debated in and passed by the Senate. *See United States v. Mitchell*, ——U.S. ——, 100 S.Ct. 1349, 1354 (1980); S. 1455, 47th Cong., 1st Sess. (1882); S. 48, 48th Cong. 2d Sess. (1883).

it (the General Allotment Act) had passed the Senate substantially in the same form as in previous sessions of Congress. *See, e.g.*, XVII Cong. Rec. 1558 and 1559 (Sen. Dawes), 1762 (Sen. Teller). As pointed out by Senator Dawes, the author of and one of the primary spokesmen for the General Allotment Act, "this is a very important bill in reference to the Indians. It has been considered, as I have already said, a great many times in the Senate." XVII Cong. Rec. 1559. Since the bill which was enacted in 1887 was viewed as essentially the same as that considered in earlier sessions and since the underlying assumptions regarding the cessation of tribal relations and the immediate extension of state laws to allottees were the same as in previous sessions,[20] it must be assumed that the intentions and understandings of Congress regarding tribal jurisdiction over non-Indians under earlier versions of the bill were, in effect, carried forth and enacted in 1887.

In light of the history just discussed, the State and Counties believe that the court below was far too narrow in its construction of the Congressional intent in passing the General Allotment Act. It appears that Congress not only contemplated that non-Indian residents would not be

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[20] Contemporaneous administrative materials respecting the General Allotment Act confirm that the underlying assumptions of Congress in enacting that Act was the same as in previous sessions. *See, e.g.*, Report of the Commissioner of Indian Affairs (1887), pp. VI, VIII-IX; Report of the Secretary of the Interior (1888), p. XXXI; Report of the Commissioner of Indian Affairs (1890), p. VI; Report of the Commissioner of Indian Affairs (1891), p. 6. Thus, as pointed out in the Report of the Secretary of the Interior for 1888,

> A beginning has already been made upon another line of policy, from which much appears justifiably to be hoped—the complete dispersion of the tribes and bands by the establishment of individuals as landowners and the investment of them with the dignity, rights and privileges of citizens in the State and nation.

Id. at XXXI.

subject to tribal regulation on their own property, but that all non-Indians, resident and non-resident, would not be subject to tribal regulation on all non-Indian owned lands within the reservation. The exercise of tribal sovereignty in the instant case would therefore be inconsistent with the overriding interests of Congress in opening reservations to non-Indian settlement. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. at 4673.

* * * *